LETTER OPINION
2004-L-63

October 6, 2004

The Honorable Lois Delmore
House of Representatives
714 S 22nd St
Grand Forks, ND 58201-4138

Dear Representative Delmore:

Thank you for your letter regarding the formula for calculating supplemental payments under N.D.C.C. § 15.1-27-11. In part, the formula requires the Department of Public Instruction to consider the amount of federal impact aid received by a school district. For the reasons outlined below, it is my opinion that the portion of the formula that is in conflict with federal law is invalid and should not be taken into consideration when calculating the supplemental payments.

ANALYSIS

The 2003 Special Legislative Session amended N.D.C.C. § 15.1-27-11 as part of S.B. 2421. 2003 N.D. Sess. Laws ch. 667, § 14. The new language added "unrestricted federal revenue received by the district" as part of the formula to determine the amount of supplemental payment for which each school district is eligible.

The Department of Public Instruction ("DPI") initially included the amount received under impact aid as part of "unrestricted federal revenue." Upon further analysis, by DPI, the Legislative Council, and this office, it was agreed that impact aid should not be included in the formula for calculating supplemental payments. The decision to remove the amounts received under impact aid from the formula for supplemental payments was based upon the federal law regarding impact aid found at 20 U.S.C. § 7709. This section states, in part:

> § 7709. - State consideration of payments in providing State aid
> (a) General prohibition
> Except as provided in subsection (b) of this section, a State may not -
> (1) consider payments under this subchapter in determining for any fiscal year -

> (A) the eligibility of a local educational agency for State aid for free public education; or
> (B) the amount of such aid; or
> (2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

"State aid" is defined in 34 C.F.R. § 222.2 as "any contribution, no repayment of which is expected, made by a State to or on behalf of an LEA [Local Education Agency i.e. School District] within the State for the support of free public education." Since supplemental payments fall within this definition, federal impact aid cannot be considered in determining the amount of the supplemental payment. While there are exceptions to this general prohibition, North Dakota does not fall within any of the exceptions. See 20 U.S.C. § 7709; 34 C.F.R. § 222.161 and 34 C.F.R. § 222.162.

The question is whether impact aid may be considered in calculating state aid or whether federal law preempts this act. Under the Supremacy Clause[1] of the United States Constitution, state law that actually conflicts with federal law is preempted. Billey v. North Dakota Stockmen's Ass'n., 579 N.W. 2d 171, 179 (N.D. 1998). "[A] state statute is void to the extent that it actually conflicts with a valid federal statute." Edgar v. MITE Corp., 457 U.S. 624, 631 (1982). "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' Hines v. Davidowitz, 312 U.S. 52, 67 (1941)." Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 204 (1983).

In 1973 this office addressed a similar issue. See N.D.A.G. Letter to Thomas (Dec. 11, 1973). That opinion addressed whether the state could deduct a specific amount from payments that would otherwise be made to a school district because the school district was receiving federal impact aid. In that case, this office concluded that the state must deduct the impact aid from payments made to the school district in accordance with state statute. That opinion, however, was based upon state and federal law that has since been amended or repealed. Specifically, this opinion looked at N.D.C.C.

[1] "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

§ 15-40.1-06 which related to general educational support (also known as "foundation aid" or "state aid"). In 1997, the Legislature enacted H.B. 1393 which separated high school supplemental payments from general educational support. See 1997 N.D. Sess. Laws ch. 178. At issue here is the supplemental payments rather than general educational support.

In addition, the previous opinion addressed Pub. L. 93-150 which suspended, for fiscal year 1974, the law forbidding states from considering impact aid when determining state aid unless the state had adopted a plan to equalize expenditures for education after June 30, 1972. The opinion stated that North Dakota had adopted such an equalization program and, therefore, there was no federal preemption issue[2].

> Traditionally, this office has been very reluctant to question the constitutionality of a statutory enactment. E.g., 1980 N.D. Op. Att'y Gen. 1. This is due, in part, to the fact that in North Dakota the usual role of the Attorney General is to defend statutory enactments from constitutional attack and because "[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution." Traynor v. Leclerc, 561 N.W.2d 644, 647 (N.D. 1997) (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)). Further, Article VI, Section 4 of the North Dakota Constitution provides that "the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.

N.D.A.G. 98-L-197. Because of this, I am reluctant to issue opinions questioning the constitutionality of a current statutory enactment unless it is manifestly contrary to the federal constitution and it is beyond a reasonable doubt that the state statute will be declared void by a court of competent jurisdiction. N.D.A.G. 2004-L-61.

In this case there is a conflict between the state and federal law such that compliance with both laws is impossible. Federal law prevents states from considering the amount a school district receives in state aid based in any way on the amount the district receives in federal impact aid. See 20 U.S.C. § 7709(a). State law requires the

[2] Pub. L. 93-150 did not define what was meant by "equalized expenditures." While this law was only in effect for one fiscal year, similar legislation was enacted thereafter. See 20 U.S.C. § 7709(b). The legislation in effect now strictly defines what is meant by a "state equalization plan." North Dakota does not meet this test. In addition, even if it did meet the equalization test North Dakota would have to obtain a certification from the secretary of education that it met the test. North Dakota holds no such certification.

Superintendent of Public Instruction to take "unrestricted federal funds"[3] into account when calculating the amount of a school district's supplemental payment. See N.D.C.C. § 15.1-27-11. As a result, under the Supremacy Clause of the United States Constitution, state law is preempted.

I have also found significant judicial precedent supporting this position which I cannot ignore. In San Miguel Joint Union School Dist. v. Ross, 173 Cal. Rptr. 292 (Cal. App. 3rd 1981) the California Legislature attempted to reduce state education aid to those local school districts that received impact aid in an effort to reduce the effect of loss of revenue following passage of Proposition 13[4]. The court found that the state aid formula "violates federal mandate and requires modification of the state grant of school aid." Id. at 294. The state was required to restore funds "[t]o the extent that federal fund amounts were not removed from consideration prior to making the reductions." Id. at 294. See also Carlsbad Union School Dist. of San Diego County v. Rafferty, 300 F.Supp. 434 (S.D.Cal.1969) (state law deducting federal impact funds from state aid was invalid under the federal Supremacy Clause); Shepheard v. Godwin, 280 F.Supp. 869 (E.D. Va. 1968) (formula whereby state deducted from school district's share a sum equal to a percentage of any federal impact aid funds received by district was unconstitutional as violating the supremacy clause of the Constitution); Douglas Independent School District No. 3 v. Jorgenson, 293 F.Supp. 849 (D. S.D. 1968) (South Dakota statutes specifying formula for deducting certain percentages of federal impact funds received by eligible districts from amount of state aid to those impacted areas are unconstitutional as being in violation of Supremacy Clause); and Hergenreter v. Hayden, 295 F.Supp. 251 (D. Kan. 1968) (a deduction from the state-aid fund to federally-impacted areas is prohibited by the federal impacted area legislation and the Supremacy Clause of the United States Constitution).

"[T]he attorney general is … the legal adviser of both the legislative assembly and the state officers … and, when requested, [shall] give opinions not only on all legal questions but also on all constitutional questions. . ." State ex rel. Johnson v. Baker, 21 N.W.2d 355, 364 (N.D. 1946). See also N.D.C.C. § 54-12-01(6), (8). "[W]hen any constitutional or other legal question arises regarding the performance of an official act [the officer's] duty is to consult with the attorney general and be guided by the opinion. . ." Johnson. "The Supreme Court of North Dakota has held that an Attorney

[3] "The federal aid granted [impact aid] is unrestricted and may be used by the District for any educationally related purpose." San Miguel Joint Union School District v. Ross, et al., 173 Cal. Rptr. 292 (CA 1981).

[4] Proposition 13 was a ballot initiative enacted by the voters of the State of California on June 6, 1978. Its passage resulted in a cap on property tax rates in the state, reducing them by an average of 57%. See http://www.fact-index.com/c/ca/california_proposition_13__1978_.html

General's opinion has the force and effect of law until a contrary ruling by a court." North Dakota Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 557-558 (N.D. 2001) (citations omitted); Roe v. Doe, 649 N.W.2d 566, 571 (N.D. 2002). Further, the Supreme Court stated in Johnson, that if officers fail to follow the advice of the Attorney General, "they will be derelict to their duty and act at their peril." State ex rel. Johnson v. Baker, 21 N.W.2d at 364. On the other hand, if the officer follows the opinion, the opinion protects a government official until such time as a court decides the question. See Johnson v. Baker, 21 N.W.2d 355, 364 (N.D. 1946).

In conclusion, the state cannot simultaneously follow the federal law, which forbids taking federal impact aid into account when calculating state aid, and at the same time follow the state law which requires taking federal impact aid into account when calculating state aid. Therefore, it is my opinion federal law preempts state law in this instance and the portion of the supplemental formula that is in conflict with federal law is invalid. As such, the Department of Public Instruction should calculate supplemental payments under N.D.C.C. § 15.1-27-11 without taking federal impact aid into account.

Sincerely,

Wayne Stenehjem
Attorney General

njl/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).